No. 15763

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DIAMOND KIMM,

Plaintiff,

vs.

BRUCE G. BARBER, etc., *et al.*,

Appellee.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

Jurisdiction.

The District Court had jurisdiction of the declaratory judgment action for judicial review of a final order of deportation, pursuant to the provisions of Title 28, United States Code, Section 2201, the Declaratory Judgment Act, and Title 5, United States Code, Section 1009, the Administrative Procedures Act.

This Court has jurisdiction of this appeal from the Findings, Conclusions and Judgment of the District Court [R. 36-41] affirming the validity of the deportation order and the determination that plaintiff was ineligible for the discretionary relief of suspension of deportation, and dismissing defendants, Bruce G. Barber and David M. Carnahan, as improper and unnecessary parties defendant in the action [R. 41], pursuant to the provisions of Title 28, United States Code, Section 1291, said judgment being a

final decision. Richard C. Hoy, District Director of the Immigration and Naturalization Service at Los Angeles, has been substituted as defendant in the place and stead of Albert Del Guercio, retired, pursuant to the order of this Court signed and entered on the 10th day of April, 1958.

Statutes and Regulations Involved.

The Warrant of Arrest issued December 13, 1941, charges that under the Act of 1924 the appellant is deportable as being unlawfully in the United States because he failed to maintain the exempt status of student on which he was admitted to the United States on July 6, 1928, under Section 4(e) of the Immigration Act of 1924.

Section 4(e) of the Immigration and Nationality Act of 1924 (8 U. S. C. 1940 Ed. 204(e)) reads as follows:

> §*204. Nonquota immigrant defined.*
>
> When used in this chapter the term "nonquota immigrant" means—
>
> * * *
>
> (e) An immigrant who is a bona fide student at least fifteen years of age and who seeks to enter the United States *solely for the purpose of study* at an accredited school, college, academy, seminary, or university, particularly designated by him and approved by the Attorney General, which shall have agreed to report to the Attorney General the termination of attendance of each immigrant student, and if any such institution of learning fails to make such reports promptly the approval shall be withdrawn; (emphasis added).

Sections 14 and 15 of the Act of 1924 (8 U. S. C. 1940 Ed. §§214, 215) read as follows:

§*214. Deportation; procedure;* * * *

Any alien who at any time after entering the United States is found to have been at the time of entry not entitled under this chapter to enter the United States, *or to have remained therein for a longer time than permitted under this chapter or regulations made thereunder,* shall be taken into custody and deported in the same manner as provided for in sections 155 and 156 of this title. . . . [Emphasis added]

§*215. Admission of persons excepted from definition of immigrant and nonquota immigrants; maintenance of exempt status.*

The admission to the United States of an alien excepted from the class of immigrants by clause (1), (2), (3), (4), (5), or (6) of section 203 of this title, *or declared to be a nonquota immigrant by subdivision (e) of section 204 of this title, shall be for such time and under such conditions as may be by regulations prescribed* (including when deemed necessary for the classes mentioned in clause (2), (3), (4), or (6) of section 203 of this title and subdivision (e) of section 204 of this title, the giving of bond with sufficient surety, in such sum and containing such conditions as may be by regulations prescribed) *to insure that, at the expiration of such time or upon failure to maintain the status under which admitted, he will depart from the United States: Provided,* That no alien who has been, or who may hereafter be, admitted into the United States under clause (1) of section 203 of this title, as an official of a foreign government, or as a member of the family of such official, shall be required to depart from the United

States without the approval of the Secretary of State. May 26, 1924, c. 190, §15, 43 Stat. 162; July 1, 1932, c. 363, 47 Stat. 524; July 1, 1940, c. 502, §2, 54 Stat. 711. [Emphasis added]

Section 19(a) of the Act of 1917 (8 U. S. C. 155(a), 1940 Ed.) reads in pertinent part as follows:

§*155. Deportation of undesirable aliens generally.*

(a) . . . any alien who shall have entered into violation of this chapter, or in violation of any other law of the United States . . . shall, upon the warrant of the Atttorney General, be taken into custody and deported. . . .

This section, as amended December 8, 1942, reads in pertinent part as follows:

§*155 Deportation of undesirable aliens generally.*

(a) Any alien who shall have entered or who shall be found in the United States in violation of the chapter, or in violation of any other law of the United States . . . shall, upon the warrant of the Attorney General, be taken into custody and deported. . . .

Section 19(c) and (d) of the Act of 1917, as amended in 1948 (8 U. S. C. 1940 Ed. 1950 Supp. 155(c) and (d)) reads as follows:

§*155. Deportation of undesirable aliens generally.*

(c) In the case of any alien (other than one to whom subsection (d) of this section is applicable) who is deportable under any law of the United States *and who has proved good moral character for the preceding five years, the Attorney General may* (1) permit such alien to depart the United States to any

country of his choice at his own expense, in lieu of deportation; or (2) *suspend deportation* of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, *if he finds* (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; or (b) *that such alien has resided continuously in the United States for seven years or more* and is residing in the United States upon the effective date of this Act. . . .

(d) The provisions of subsection (c) shall not be applicable in the case of any alien who is deportable under (1) section 137 of this title. . . ."

Section 23 of the Internal Security Act of 1950 (64 Stat. 987, 1010) (Sept. 23, 1950) amends Section 20 of the Immigration Act of 1917 (8 U. S. C. 156, 1940 Ed. 1951 Supp.) and reads in part as follows:

§156(a). Control over and facilitation of deportation.

. . . No alien shall be deported under any provisions of this Act to any country in which *the Attorney General shall find* that such alien would be subjected to physical persecution. . . . [Emphasis added]

The regulations applicable at the time of the enactment of the Internal Security Act make it clear that the Immigration hearing officers had no authority to make the determination under Section 23 (*supra*) and that it was the enforcement division, *i. e.,* "officers in charge of district offices" and the Assistant Commissioner or Commissioner who were required to make the determination as to which country a deportable alien should be sent.

Section 151.5(a) of Title 8, Code of Federal Regulations (1949 Ed. 1951 Supp.) (15 Fed. Reg. 7638), as amended November 8, 1950, reads as follows:

> *§151.5 Decision—(a). Preparation by hearing officer of written decision.*
>
> Except as provided in paragraph (d) of this section, the hearing officer shall, as soon as practicable after the conclusion of the hearing, prepare in writing a decision, signed by him, which shall set forth a summary of the evidence adduced and his findings of fact and conclusions of law *as to deportability.* If the alien has applied for relief from deportation, the decision shall also contain a separate determination as to whether or not the hearing officer is satisfied, on the basis of the evidence presented, *as to the alien's statutory eligibility for the relief requested.* The decision shall be concluded with a statement of the hearing officer's disposition of the case which shall be (1) that the alien be deported, or (2) that the warrant of arrest be cancelled, or (3) that the alien be found to have established statutory eligibility for suspension of deportation, or (4) that the alien be granted voluntary departure at his own expense in lieu of deportation, or (5) that the alien be granted voluntary departure at his own expense in lieu of deportation with the addidtional privilege of preexamination, or (6) that such other action be taken in the proceedings as may be required, for the appropriate determination of the same. *The hearing officer shall have no authority to exercise the Attorney General's powers* under section 19(c)(2) of the Immigration Act of February 5, 1917, as amended, or under the 7th proviso to section 3 of that act. [Emphasis added]

Sections 152.2 and 152.3(a), Title 8, Code of Federal Regulations (1949 Ed. 1951 Supp.) as amended Nov. 28, 1950 (15 Fed. Reg. 8109) read as follows:

> §*152.2. Issuance and execution of warrants of deportation—(a) Issuance.* The officer in charge of the appropriate district shall issue a warrant of deportation in cases in which the Commissioner's order directs deportation.
>
> * * * * * * * *
>
> §*152.3. Deportation—(a) Manner of.* If deportation is to be effected by vessel or airplane, notice of the proposed deportation of any alien shall be given to the transportation company concerned, together with a brief description of the alien and any other appropriate data, including the cause of deportation, physical and mental condition, and destination. Any request from the transportation lines to defer delivery of the alien for deportation shall be accompanied by a written agreement from the line concerned that it will be responsible for all detention expenses resulting from such deferment. Subject to applicable law and regulation the officer in charge of the appropriate field district, *the Assistant Commissioner, Enforcement Division, or the Commissioner, shall have exclusive authority* to designate at whose expense and to which country a deportable alien shall be deported.

Section 243(h) of the Immigration and Nationality Act of 1952 (8 U. S. C. 1253(h)) reads as follows:

> *Withholding of deportation.*
>
> (h) The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such

period of time as he deems to be necessary for such reason. June 27, 1952, c. 477, Title II, ch. 5, §243, 66 Stat. 212.

The Rules and Regulations at the time of the Immigration Act of 1924 and in 1928 when the plaintiff was admitted to the United States were not published in a Federal Register or other Code of Federal Regulations. However, they were printed by the Government Printing Office and were available in pamphlet form, dated March 1, 1927 [see Ex. B in evidence, pp. 125, 126]. The pertinent portions of Rule 9(a) and Rule 9(d) read as follows:

Rule 9(a). "Students" defined.

A bona fide student within the meaning of subdivision (e) of Section 4 of the Act of 1924 is a person at least 15 years of age who is qualified to enter and has definitely arranged to enter an accredited school, college, academy, seminary or university, particularly designated by him and approved by the Secretary of Labor, and who seeks to enter the United States *temporarily for the sole purpose of pursuing a definite course of study at such institution,* and who shall voluntarily depart from the United States upon the completion of such course of study.

Rule 9(d). Abandonment of status.

Any immigrant student admitted to the United States as a nonquota immigrant under the provisions of subdivisions (e) of Section 4 of the Immigration Act of 1924 who fails, neglects or refuses regularly to attend the school, college, academy, seminary or university to which he has been admitted or who otherwise fails, neglects or refuses to maintain the status of a bona fide student, or who is expelled from such institution, *or who engages in any business or occupation for profit,* or who labors for hire, shall be

deemed to have abandoned his status as an immigrant student and shall, upon the warrant of the Secretary of Labor, be taken into the custody and deported.

It will be remembered that the Secretary of Labor was the head of the Immigration Service prior to the time it was transferred to the Department of Justice.

By a General Order, No. 207 [Ex. C for Ident.], of December 21, 1933, Rule 3 of the Rules and Regulations of January 1, 1930, subdivision (h), was amended so as to define the term "status" as used in the Immigration Act of 1924 as follows:

1. The term "status" as used in the Immigration Act of 1924 means the condition of carrying on one of the particular limited activities for which an alien may be admitted under a subdivision of Section 3 or under subdivision (e) of Section 4. . . .

3. The admission of such alien by an examining officer, by Board of Special Inquiry, or by an officer in charge at a port, shall be for a reasonable, fixed period not exceeding one year and on condition that the alien shall maintain during his temporary stay in the United States the specific status claimed and shall voluntarily depart therefrom at the expiration of the time fixed or upon failure to maintain the specific status under which admitted.

Statement of the Case.

This is a case in which the appellant, a Korean, was admitted to the United States on July 6, 1928, as a student, under Section 4(e) of the Immigration Act of 1924 (8 U. S. C. 204(e), 1940 Ed.), and no permission to change that status has ever been granted. The record shows [Ex. D, 3/14/42 hrg. p. 4] that as of 1938 appellant abandoned the status of a student and was employed full time.

The long history of the proceedings whereby appellant, 30 years later, still resists deportation is summarized in a Chronology attached to this brief as Appendix A. It will be noted from the chronology that a warrant of arrest was first issued in December 1941 charging appellant as subject to being deported under the Immigration Act of 1924 "in that he has remained in the United States after failing to maintain the exempt status of student under which he was admitted." Hearings in deportation were commenced in March, 1942 [Ex. D, p. 1, of 3/14/42 hrg.] and resulted in the issuance of an order of deportation by the Commissioner of Immigration, with the privilege of voluntary departure.

Subsequently, in 1949, after the Supreme Court decision in *Sung v. McGrath,* 339 U. S. 33, and after the amendment of Section 19(c) of the Immigration and Nationality Act (8 U. S. C. 155(c) 1950 Supp.) hearings were reopened to allow appellant to apply for suspension of deportation, to which privilege he had not previously been eligible, and he was given notice of new deportation hearings in accordance with *Sung v. McGrath, supra.* At this hearing, which began on June 16, 1950, appellant was again served with the warrant of arrest [Ex. A, p. 2 of 6/16/50 hrg.]. The hearing officer again entered a proposed order of deportation [Ex. A] and proposed that the order granting voluntary departure be withdrawn. A copy of the decision of the hearing officer is attached to this brief, marked Appendix B. The Commissioner of Immigration ordered appellant's deportation "pursuant to law" and found appellant ineligible for the discretionary relief of suspension of deportation and denied voluntary departure. The Board of Immigration Appeals affirmed.

At the Court hearing on review of the deportation order, there was introduced into evidence, as Government's Ex-

hibit A, a certified copy of the hearings of 1950-52, and as Government's Exhibit D, a certified copy of the hearings of 1940-41. A list of exhibits in the District Court hearing, indicating pages in the Transcript of Record where referred to, is attached hereto, marked Appendix C.

Appellant belabors the point that the parties below agreed that the record for review was limited to Exhibit A—the 1950-52 hearings—(App. Br. p. 3) and strives mightily to ignore the 1940-42 hearings, which appellant claims are not properly part of the administrative record because they were not expressly introduced as exhibits in evidence in the 1950-52 administrative hearings. The whole structure of many of appellant's points on appeal rests on his ability to ignore the 1940-42 hearings as though they never occurred.

It is conceded that the 1940-41 administrative hearings were not marked as exhibits in the 1950-52 hearings or otherwise expressly incorporated therein, but the 1950-52 record of hearings shows that counsel for appellant examined the March and October 1942 administrative hearings before proceeding with the 1950 administrative hearings [Ex. A, p. 9 of 10/2/50 hrg.], and the hearing examiner certified that he had familiarized himself with the prior proceedings [Ex. A, 10/2/50 hrg., Ex. 3].

Based upon this fact, and upon appellant's contention (disputed by appellee) that the 1950-52 hearings pertained solely to the question of the grant or denial of suspension of deportation, appellant makes the contention that there is no evidence to support the finding of deportability.

It is stipulated in the record that sometime in 1952 appellant asserted a claim of physical persecution if deported to Korea, that evidence was submitted thereon to the Im-

migration Service, but that no determination either adverse to appellant or in favor of appellant's claim has yet been made by the Attorney General [R. 32, B-22].

Despite the fact that there is no adverse determination of appellant's claim of physical persecution, and the matter is still pending at the administrative level, appellant claims a violation of due process, as alleged in paragraph X of the Amended Complaint [R. 5]. However, contrary to that allegation, the order of deportation [Ex. A] directs plaintiff's deportation "according to law" and does not designate the place of deportation. When asked what country he specified to be deported to, in the event he was found deportable, appellant said "I want to go to my home country, Korea" [Ex. A, p. 57 of 1/15/51 hrg.].

The Court, while conceding that an adverse administrative determination regarding the claim of physical persecution might be reviewable to ascertain if there was an abuse of discretion in a "finding" under Section 23 of the Internal Security Act of 1950 or in an "opinion" under Section 243(h) of the 1952 Act, concluded that the allegation was premature, since the administrative remedy has not been exhausted and so stated in the Judgment below [R. 40].

An outline of Exhibits A and D in evidence, indicating the list of exhibits attached thereto during the administrative hearings, is set forth below. As in all Immigration files, the hearings are page-numbered in consecutive order.

March 14, 1942 Hearing [Ex. D in evid.] pp. 1-9.

Exhibit 1—Warrant of Arrest.

Exhibit 2—Form I-255 Application for Suspension and voluntary departure at own expense.

Exhibit 3—Certificate of Admission.

June 16, 1950 Hearing [Ex. A in evid.] pp. 1-7.

Exhibit 1—Copy of Warrant of Arrest.

Exhibit 2—Central office Order to reopen case.

October 2, 1950 cont'd Hearing [Ex. A in evid.] pp. 8-43.

Exhibit 3—Certificate that hearing examiner has familiarized himself with prior proceedings.

Exhibit 4—Application for Suspension of Deportation.

Exhibit 5—Affidavit of Yong Whang.

Exhibit 6—Order of Board of Immigration Appeals of April 17, 1943.

Exhibit 7—Letter to Mr. Kimm advising of Board of Immigration Appeal's order.

Exhibit 8—3/28/47 memo. from file of Immigration Service *re* alien's attempt to secure exit visa.

Exhibit 9—5/2/43 Letter of Mr. Kimm to Immigration Service—acknowledges receipt of Justice Dept. order.

Exhibit 10—12/8/50 Report of Investigation.

Exhibit 11—7/11/50 F.B.I. report *re* check of their files.

Exhibit 12—10/13/50 Letter to Officer-in-Charge, San Ysidro.

Exhibit 13—10/16/50 Reply to No. 12.

January 15, 1951 Hearing, pp. 43-57.

Exhibit 14—Affidavit of Sung Tark Lin.

Exhibit 15—11/9/45 Letter—War Dept. to Mr. Kimm.

Exhibit 16—12/5/45 Letter War Dept. to Mr. Kimm.

Exhibit 17—6/27/46 Letter Robt. Cross to Mr. Kimm.

Exhibit 18—7/16/46—U. S. Army Military Govt., Korea, letter to Mr. Kimm.

I.

The District Court Received in Evidence the Administrative Records of Both the 1940-42 Hearings and the 1950-52 Hearings and the Review Below Was Therefore Not Limited to the 1950-52 Hearings.

The District Court admitted in evidence, for review, the administrative record of both the 1940-42 administrative hearings [Ex. D] and the 1950-52 hearings [Ex. A]. Appellant's assertion that the 1940-42 record "was not made a part of the later record" (App. Br. p. 21) and could therefore form no part of the "evidentiary basis for decision," is based on the fact that the 1940-42 hearings were not expressly marked as an exhibit in evidence in the 1950-52 hearings.

The conclusion does not follow from that fact. At the October 2, 1950 hearing [Ex. A, p. 9], the hearing officer presented to appellant's counsel the record of the hearings of March 14, 1942, and May 16 and October 27, 1942, and appellant's then counsel, Rose Rosenberg, said,

> "Let the record show that I have examined File A-5-752-764 containing the hearings at Santa Ana, the proposed findings, conclusions and order, together with the exhibits attached thereto . . . also, the reopened hearing of June 16, 1950."

Further, if it were error to admit the 1940-42 hearings in evidence for review, which we do not concede, it was not prejudicial to appellant if the 1950-52 hearings support the decision of deportability, which we contend they do.

Further, we think it incorrect to say that the parties had an "agreement" regarding what constituted the record for review or that it was a "violation of the agreement by the parties" for the Court to admit Exhibit D in evidence. The real question here is whether or not the record for

review is complete, and no agreement of the parties one way or another can determine that question. The only result that can be achieved if the parties "agree" what constitutes the record is that neither will object to the record on appeal.

It is quite apparent in this case that appellant, in his difficult search for some point on appeal, would object regardless of which way the Court decided the matter; either objecting that Exhibit D is an improper part of the record because not identified as an exhibit in the 1950-52 hearings (although clearly under consideration by both the hearing officer and counsel for appellant); or objecting (as he does) that the 1950-52 hearings alone are incomplete and insufficient to support the finding of deportability. Either way the point has no real merit. What is more important is that it is clear that nothing has been omitted from the record in the District Court on this review action.

II.

In Both the 1940-42 and the 1950-52 Hearings the Record Unquestionably Shows Appellant Was Given Adequate Notice of Hearings on the Charges Contained in the Warrant of Arrest Relating to His Deportability as Well as the Question of Discretionary Relief of Suspension of Deportation.

As the District Court pointed out during the course of the hearings, if one is applying for the discretionary relief of suspension of deportation, how can it be said that he does not know that the Government seeks to deport him? [Record A 11-A 12 Supp. to hrg. May 13, 1957.]

Appellant contends in his Point II-B and C that the 1950-52 hearings were limited in purpose and scope to the question of extension of deportation and that appellant was

not clearly informed that the nature and purpose of the proceedings related also to his deportability. How does he explain the following language contained in Exhibit A in evidence, at page 2 of the June 16, 1950, hearing?:

"Q. I have here a warrant of arrest which I present to counsel and furnish you a copy and furnish counsel a copy, issued by the Central Office of the Immigration and Naturalization Service at Washington, D.C. on December 13, 1941, charging that Diamond Kimm or Kim Kang or Kin Sang or Soong Iop Kim who entered the United States at San Francisco, California on July 6, 1928, has been found in the United States in violation of the Immigration laws thereof to-wit:

> The Immigration Act of 1924, in that he has remained in the United States after failing to maintain the exempt status of student under which he was admitted.

Do you understand the charge contained in the warrant? A. Yes.

Q. This warrant is not shown to have been served however you are now furnished a copy of this warrant and it is served upon you. Are you the person named in this warrant of arrest? A. Yes.

Hearing Examiner to Respondent and Attorney of record:

Q. You are advised that the purpose of this hearing is to determine the right of the respondent to be and remain in the United States and to enable him to show cause, if there be any, why he should not be deported from the United States in conformity with law. Do each of you understand?

A. By Respondent: Yes.

A. By Counsel: I do.

By Hearing Examiner:

Q. In this proceeding you have the right to offer evidence to meet any evidence presented or adduced by the Government, to cross-examine any witnesses and to make objections to be entered on the record. Do you each of you understand?

By Respondent: Yes.

By Counsel: I do."

Said hearings were continued on October 2, 1950, and the record contains the following [Ex. A p. 9]:

"Hearing Examiner to Counsel: I present to you for your inspection record of hearing of March 14, 1942, May 16 and October 27, 1942, to which is attached the opinion of the Presiding Inspector of those hearings, and order of the United States Immigration and Naturalization Service at Washington, D. C. of April 6, 1949, and ask you to state when you have read and familiarized yourself with this transcript.

Counsel: Let the record show that I have examined file A5 725 764 containing the hearing at Santa Ana, the proposed findings, conclusions and order, together with the exhibits attached thereto.

Hearing Examiner to Counsel: I present for your inspection transcript of record of the reopened hearing conducted on June 16, 1950, and ask you to state when you have familiarized yourself with that transcript.

Counsel: Let the record show that I have examined the transcript of the hearing dated June 16, 1950, together with the exhibits attached thereto.

Hearing Examiner to Counsel: I understand at the hearing on June 16, 1950, you have indicated that you were a temporary counsel in this case. A. Yes.

Hearing Examiner to Counsel and Examining Officer: In accordance with regulations I now enter a certificate that I have familiarized myself with the prior proceedings. This certificate is now marked—

Exhibit No. 3

of the reopened hearing."

Subsequently the hearings were continued to January 4, 1951, at which time Mr. Samuels, present counsel for appellant, requested a continuance in order to familiarize himself with the record and the matter was continued to January 8, 1951, and again to January 15, 1951.

At the January 4, 1951, hearing, the record shows [Ex. A, p. 22]:

"Q. Are you the same person as a Diamond Kimm whose hearing in deportation proceedings was continued on October 2, 1950, on motion of Counsel Rosenberg? A. Yes.

* * * * * * * *

Q. Are you ready to proceed, Mr. Samuels? A. I—at this time I should like to move for a formal continuance of the present proceedings on the grounds that I have another matter set for trial this morning in the Superior Court of Los Angeles County and have not had an opportunity to familiarize myself with the record of the prior proceedings in this case. . . ."

In the hearing on January 15, 1951, is contained the following [Ex. A, p. 57]:

"Q. In the event you are found subject to deportation and ordered deported, what country do you specify as the country to which you shall be deported? A. I want to go to my home country, Korea."

The June 6, 1950, letter of the Immigration Service to Mr. Kimm, addressed at 1441 West Jefferson Boulevard, Los Angeles, California, reads in part as follows [Ex. A]:

> "You have heretofore been accorded a hearing to show cause why you should not be deported under a warrant of arrest issued March 14, 1942, charging that you have been found in the United States in violation of Immigration laws. In view of the decision of the Supreme Court in the *Sung v. McGrath* case, it will be necessary to accord you a *new* hearing under that warrant.
>
> "You are requested to appear for the hearing to be held at 9 A.M. on June 16, 1950, in Room 110-E, W. M. Garland Building, 117 West Ninth Street, Los Angeles, California. . . .
>
> * * * * * * * *
>
> ". . . The purpose of the hearing is to determine your right to be and remain in the United States under Immigration laws, and particularly Section 19 of the Immigration Act of February 5, 1917, as amended." (Emphasis added.)

Subsequently, on January 15, 1951, the hearing officer made a proposed order of deportation and that the order granting voluntary departure be withdrawn, and on May 13, 1951, the Commissioner ordered deportation "pursuant to law," and there was no objection at that time by appellant or his counsel that they did not know it was a hearing in deportation or that they had any other or additional evidence to present. How appellant could have been served with a proposed order of deportation, and participated in the hearing which also related to suspension, and now make the argument which he makes under Point II of his brief is not understandable.

Further, we cannot agree with the statements in the second and third paragraphs of appellant's brief, at page 24, that the Immigration Service had only the alternative of having reopened hearings for the limited purpose of considering eligibility for suspension, or conducting *de novo* deportation proceedings. He cites no law or authority for these statements other than the case of *Sung v. McGrath,* and as this Court is well aware, subsequent legislation relieved the Immigration Service of the necessity of compliance with Section 7 *et seq.* of the Administrative Procedures Act.

No authority is cited for the proposition that the Immigration Service could not hold new deportation hearings and consider the matter of suspension at one and the same time. In fact, this is normally the way the matter is considered. However, it happened in this case that at the time of the original hearings appellant was not eligible for suspension of deportation, but by subsequent amendment to the statute was entitled to have the matter considered.

Points ID and IE of appellant's brief, pages 27-29, do not require any answer, other than to point out that the warrant of arrest contained the additional words "in that he has remained in the United States after failing to maintain the exempt status of student under which he was admitted.

III.

The Finding That Appellant Failed to Maintain the Exempt Status of a Student Is Supported by Reasonable, Substantial and Probative Evidence in Both the 1950-52 and 1940-42 Hearings.

Appellant's entry into the United States as a non-quota immigrant was based upon his exempt status as a student. Under Section 204 of the Nationality Act of 1924 a non-quota immigrant is defined *(supra)* as one who seeks to enter the United States "solely for the purpose of study," and Section 214 of the 1924 Act provides for the deportation of those who "have remained therein (the United States) for a longer time than permitted by this chapter or regulations thereunder." Section 215 provides for the giving of bond by such person to "insure that at the expiration of such time or upon the failure to maintain the status under which admitted, he will depart from the United States." Section 155 of the 1942 Act provides that any alien who shall be "found in the United States in violation of this chapter . . . shall . . . upon warrant of the Attorney General be taken into custody and deported."

Section 9(a) of the Rules and Regulations applicable in 1928 *(supra)* [Ex. B, pp. 125-126] defines a student in terms similar to the above statute, that is, as one who seeks to enter the United States "temporarily for the *sole* purpose of pursuing a definite course of study."

Rule 9(b), defining abandonment of status, provides for the deportation of any "immigrant student admitted to the United States as a non-quota immigrant . . . who engages

in any business or occupation for profit or who labors for hire."

General Order No. 207 *(supra)* [Ex. C] defines "status" as the "condition of carrying on one of the particular limited activities for which an alien may be admitted . . ." and such admission shall be "on condition that the alien shall maintain during his temporary stay in the United States the specific status claimed or shall voluntarily depart therefrom at the expiration of the time fixed or upon failure to maintain the specific status under which admitted."

Appellant, admitted to the United States in 1928, now 30 years later is claiming (App. Br., Pt. III) that there is no evidence to show that he has "abandoned his student status," although he does concede in his brief that he accepted employment.

In the 1950-52 hearings on October 2, 1950, at pages 13-15, Exhibit A, is contained the following:

> "Q. Mr. Kimm, will you state your employment during the time that you lived in Artesia? A. Yes. At that time I have been working as chemist at Bergs Metal Corporation located on 28th at Long Beach Boulevard.
>
> Q. That was for the entire period of your residence in Artesia? A. Yes.
>
> Q. Where were you employed after that? A. When I moved into town I did some work, I continued that work until 1944, January. I don't know the exact date."

Further on he relates that:

"In 1945 I started work as assistant chemist again at Tripplet and Barton located on Century Boulevard in Fullerton, California, I don't recall the exact number, until January of 1945."

On page 14:

"Q. Where was your employment? A. At this time my own business, printing."

(This was referring to a period in 1948.)

"Q. Did you run a print shop then? A. Yes."

The 1940-42 hearings are replete with evidence of abandonment of student status and employment for hire and in his own business. At the very beginning of the hearings on March 14, 1942, at page 4, the following is contained:

"Q. When did you last attend school? A. July 1938, I think.

Q. Have you been enrolled in any school since that time? A. No.

Q. Why did you abandon your status as student in June 1938? A. It was hard to operate any small business and continue my study and research work which requires full time, so I had to give up either one of them and for study I got to get means to study and it is very hard. Times were getting harder and harder."

IV.

Appellant Was Found Ineligible for Suspension of Deportation, Among Other Reasons, for Failure to Prove Good Moral Character for the Preceding Five Years and Because of His Refusal to Answer Questions Which Might Establish His Deportability on the Grounds Specified in Section 19(d) of the Act of 1917 and Section 137 Thereof, in Which Event He Would Be Ineligible for Suspension.

In the second half of the January 15, 1951, decision of the Hearing Officer [Ex. A], a copy of which is attached as Appendix B to this brief, the Hearing Officer sets forth fully the factors relating to discretionary relief, makes findings of fact and concludes as a matter of law that the appellant failed to establish statutory eligibility for suspension of deportation.

Under Section 19(c), as amended (8 U. S. C. 155(c)) *(supra),* the Attorney General *may* suspend deportation in the case of any alien (other than one to whom subsection (d) is applicable) who has proved good moral character for the preceding five years, if he finds such alien has resided continuously in the United States for seven years.

It is conceded appellant meets the seven-year residence requirement, but the Hearing Officer found that he had failed to prove good moral character for the past five years in that he declined to answer questions which might establish that he was deportable on the grounds specified in subsection (d).

Subsection (d) *(supra)* provides that subsection (c) shall not be applicable to an alien deportable under Section 137 of the same title. Section 137 relates to aliens

who are members of or advise, advocate or teach . . . the overthrow by force or violence of the government of the United States. As amended in 1952, this section (now found in 8 U. S. C. 1182) specifically reads: ". . . aliens who are members of . . . the Communist Party."

Appellant, in the 1950-52 hearings, declined to answer any questions relating to whether he was then a member of the Communist Party or if he had ever been a member of the Communist Party. "Yes," answers to these questions would have established respondent's deportability under Section 137, and therefore pursuant to Section 19(d) he would have been ineligible for relief of suspension of deportation under Section 19(c), as well as for failure to carry his burden of establishing good moral character.

The Hearing Officer's decision, affirmed by the Board of Immigration Appeals, is therefor proper in holding appellant ineligible for suspension. The Hearing Officer's decision also finds appellant ineligible for suspension because he *failed to affirmatively establish his good moral character,* and points out in the body of the opinion that "In view of his failure to answer the questions propounded, the respondent has not affirmatively proved that he has been a person of good moral character for the past five years."

Appellant cites the *Konigsberg* and *Schware* cases (*Konigsberg v. State of Calif.,* 353 U. S. 252, and *Schware v. Board of Bar Examiners of the State of New Mexico,* 353 U. S. 232), which we think are sharply distinguishable from the present case.

In this case the Immigration Service did *not* infer from appellant's failure to answer questions that he *was not* a person of good moral character as was the case in *Konigsberg* and *Schware.* Rather, the hearing officer

makes it clear in his findings [Fdgs. 1 and 5 at p. 6 of the Hearing Officer's Opin. in Ex. A] that the holding is that appellant is ineligible for the discretionary relief of suspension because (1) he *failed to sustain his burden of affirmatively proving good moral character* because he did not testify, either on his own initiative or in answer to questions propounded to him, on his affiliations with organizations and thereby closed the door to a large body of material which might or might not bear on his good moral character, and (2) he failed to show he is eligible for the relief as a person who is not a member of proscribed organizations and therefore is not barred by the exception in Section 19(d). This latter holding is not placing on the appellant an impossible burden (as suggested in appellant's brief, p. 33) of proving that he was not a member of *any* class excluded from a grant of relief. Here he is specifically asked questions with regard to one class of aliens who would be ineligible for relief, the class mentioned in Section 19(d), to wit: aliens who are affiliated with proscribed organizations, and he remains silent.

He declines to furnish evidence on this one phase when his attention is specifically directed to it, and in a proceeding where, as this Court said in *Jimenez v. Barber* (9 C. A. Jan. 1958), 252 F. 2d 550 at 554:

> ". . . the refusal to answer questions was in a proceeding in which the applicant sought nothing to which he was entitled as a matter of right. He asked only for an act of grace, dependent upon an official exercise of sound discretion. . . ."

It is in the *Jimenez* case also *(supra)* that this Court upholds a similar denial of suspension of deportation. In that case, in an administrative hearing on an application for suspension of deportation under Section 155, Jimenez

refused to answer questions about his membership in or affiliation with certain organizations, including but not limited to the Communist Political Association and the Communist Party, not only pertaining to the five-year period prior to the application for suspension, but to the years prior thereto. The application for suspension was denied and in subsequent court proceedings (*Jimenez v. Barber,* 235 F. 2d 922, cert. den. 78 S. Ct. 327) a judgment dismissing the action for declaratory relief and injunction was affirmed.

Subsequently, Jimenez filed with the Immigration Service a motion to reopen proceedings and for stay of execution and offered to answer the questions, and thereafter was denied a temporary restraining order by the District Court to preserve the *status quo* pending decision of the Board of Immigration Appeals on his motion to reopen. The Court of Appeals granted an *ex parte* order, temporarily restraining deportation until January 30, 1958. On January 24, 1958, appellant noticed for hearing a motion to extend this order and appellee filed a motion to dissolve the restraining order and dismiss the appeal from the denial of the District Court. This Court held that no substantial question was presented on the appeal and therefore denied the extension and dismissed the appeal as frivolous. In arriving at that decision, the Court necessarily had to approve the view that the failure to answer questions concerning membership in the proscribed organizations was sufficient grounds upon which to deny the application for suspension. The Court said, at page 553:

> "During the hearing on his application to suspend deportation, Jimenez declined to answer any questions concerning his past affiliations, memberships, and beliefs. It cannot be questioned that Jimenez was entitled to adopt this course, so that he could test the

right of the hearing officer to propound such questions. As stated in this court in Jimenez v. Barber, 226 F. 2d 449, the constitutional questions which he thus chose to raise were substantial ones.

"In choosing this course, however, Jimenez was required to accept the hazards as well as the possible advantages which it afforded. Had his refusal to answer proper questions been in an ordinary civil action in which he was plaintiff, a trial court judgment would unquestionably have been entered against him. Were he successful in establishing, on appeal, that the questions were improper, this would gain him a new trial. But if unsuccesful, he would have no standing to demand reopening of the case on the strength of an offer to answer the question. Likewise, where a witness has brought down upon himself a conviction for contempt because of a mistaken belief that he could refuse to answer certain questions, he cannot escape the penalty by making an offer, long after the proceedings have ended, to answer the questions propounded.

"The case before us is much less favorable to Jimenez than the analogies which have been cited. *Here, the refusal to answer questions was in a proceeding in which the applicant sought nothing to which he was entitled as a matter of right. He asked only for an act of grace, dependent upon an official exercise of sound discretion.* The hazards in adopting an obstructive attitude in such a proceeding must be at least as great as those involved in cases where established rights are sought to be enforced or protected." (Emphasis added.)

V.

No Finding Regarding Physical Persecution Is Required as a Condition to Determination of Deportability, Which Is a Quasi-Judicial Function of the Hearing Officer; It Is the Function of Enforcement Officers to Determine the Place to Which the Alien Shall Be Deported; the Law and Regulations Contemplate That First a Determination of Deportability Be Made and When That Order Has Become Final, Then the Enforcement Officer Shall Make a Determination as to the Place to Which the Alien Shall Be Deported. Any Claim of Physical Persecution Should Then Be Separately Determined.

In Appellant's Supplemental Brief, Point V, it is argued that the deportation order herein is not lawful, because no finding was made by the Attorney General as a part of the deportation order, regarding possible physical persecution as a result of deportation. We are aware of no authority which holds that the designation of the country of deportation and a ruling on the issue of physical persecution must take place as part of the process of adjudicating deportability, or that it is a precondition to an order of deportation. The cases merely hold that where a claim of physical persecution is raised under the appropriate law, the Attorney General must find that there will be no such persecution in the designated country before *deporting* the alien to that country, as distinguished from entering an order of deportability.

The claim is based on Section 23 of the 1950 Internal Security Act (see statutes involved, *supra*) but the regulations which were applicable at the time that act became effective on September 23, 1950, make it clear that a distinction was made between the procedures for determining

deportability and the procedures for determining to which country the deportable alien should be sent. The former, being quasi-judicial in nature was entrusted to hearing officers who were authorized to make findings and decisions with respect to deportability and discretionary relief from deportation, but were specifically forbidden "to designate . . . to which country the alien shall be deported," see Section 151.5(a) of Title 8, Code of Federal Regulations (Statutes and Regulations Involved *supra*).

It was only after deportability had been adjudicated that the regulations contemplated a determination should be made as to which country a deportable alien should be sent, and the authority to make such designation was delegated exclusively to enforcement, as distinguished from adjudicative officers, *i. e.,* officers in charge of field districts, the Assistant Commissioner of the Enforcement Division or the Commissioner. See Section 152.3(a) of Title 8, Code of Federal Regulations (Statutes and Regulations Involved *supra*).

The administrative file here shows that the alien was asked what country he desired to be deported to, if found deportable, and he stated "Korea." However, the deportation order as entered by the hearing officer and affirmed by the Board of Immigration Appeals merely recites that appellant shall be deported "according to law," which for the first time, after the enactment of the Internal Security Act of 1950, gave the alien a choice of country. Subsequently the Act of 1952 containing Section 243(h) (Statutes and Regulations *supra*) enacted the provision, under which the appellant is now seeking in a separate proceeding to establish his claim of physical persecution. As conceded at the trial and found by the District Court, no adverse decision to the appellant has been made in that proceeding.

The case of *Harisiades v. Shaughnessy,* 187 F. 2d 137 (C. A. 2, 1951), bears out the above procedures. There the alien at an administrative deportation hearing on October 15, 1946, testified he thought he would be persecuted if sent to Greece. The final deportation order and the District Court's order dismissing the writ of *habeas corpus* were entered before enactment of the Internal Security Act of 1950, which for the first time gave the alien a choice of country and precluded deportation to any country in which the Attorney General should find that the alien would be subjected to physical persecution. Since these new provisions had become part of the deportation statute while the matter was pending on appeal, the Court of Appeals, although sustaining the finding of deportability, remanded the case to the District Court with directions to hold it in abeyance pending compliance by the Attorney General with the new provisions. This disposition of the matter shows clearly the severability of the merits (*i. e.,* the question of deportability) from the collateral issue of physical persecution.

Moreover, the Second Circuit's *Harisiades* case and the cases of *Sang Ryup Park v. Barber,* 107 Fed. Supp. 603 (N. D. Cal., May 9, 1952), and *Chen Ping Zee v. Shaughnessy,* 107 Fed. Supp. 607 (S. D. N. Y., March 18, 1952), were all decided before the enactment of the Immigration and Nationality Act of 1952. That the execution of pre-1952 Act orders of deportation is now governed by Section 243(h) of the 1952 Act is shown by *Dolenz v. Shaughnessy,* 206 F. 2d 392 (C. A. 2, 1953). The alien there had been denied a stay of deportation on a physical persecution claim on May 21, 1952, before enactment of the 1952 Act, and the administrative decision was sustained on *habeas corpus,* 107 Fed. Supp. 611, affirmed 200 F. 2d 288 (C. A. 2, 1952), cert. den. 345 U. S. 928. He

thereupon moved in the District Court for rehearing on the ground of newly discovered evidence. The motion was denied. By that time the 1952 Act had taken effect. The Court of Appeals sustained the appellee's contention that Section 243(h) of the 1952 Act governed, citing *Harisiades* and other Second Circuit decisions (206 F. 2d at p. 394, fn. 6).

Here the final order of deportation was made on January 22, 1952, when the Board of Immigration Appeals dismissed the appeal. The Complaint for review of that deportation order was filed in the District Court on September 21, 1956. It seems clear that no attempt has been made to execute a warrant of deportation pending the Attorney General's determination of the claim of physical persecution. By not appealing the 1952 order of deportation for four years, the appellant has thereby extended the ultimate date when said order may be upheld as valid and, likewise, the ultimate date when the warrant of deportation may be attempted to be executed by the Immigration Service.

Appellant (App. Supp. Br. p. 5) cites the *Accardi* case (*Accardi v. Shaughnessy,* 347 U. S. 260 at 268), for the proposition that status and rights acquired under former law are preserved and protected by virtue of the savings clause in Section 405(a) of the Nationality Act. (We do not find that *Accardi* is authority for that proposition.) As we read that decision, it held that in considering the application for suspension of deportation, which under the rules and regulations is properly considered at the time of

determining the deportability of the alien, the Immigration Service "failed to exercise" its discretion *re* suspension because it considered a list which the Attorney General had published naming persons to be deported, and in effect thereby adopted the Attorney General's determination, rather than exercising its "own" determination.

It has long been the practice and is well established under the rules and regulations that the application for suspension of deportation must be made at the time of the Immigration hearings regarding deportability. This is a far different thing from a consideration of a claim of physical persecution. The evident purpose of the statute and regulations to have the physical persecution matter separately determined by the enforcement officers accords with the practicalities of the matter.

There is little value in having a determination regarding claim of physical persecution made prior to the time that the deportation order has been held valid. It might be several years before the deportation order is upheld by the Court on review, and the question of whether or not the alien would be subjected to physical persecution if deported to a specified country would and might indeed change during the two years. It is likewise clear that it is necessary to first invoke the procedure with regard to determining the place to which the alien shall be deported, and to determine whether or not a particular country will accept the alien. It is useless to determine whether or not physical persecution might result if deported to a country as to which there is no possibility of the alien being deported,

or as to a country where during the years the situation might change.

Nor is the case of *Yanish v. Barber,* 211 F. 2d 467, cited by appellant, in point. In that case, the Immigration Service had been enjoined by the Court from requiring the petitioner to amend the terms of bail bond to require periodic visits by him to the Immigration Service, at a time when the statutes did not support such procedure. Subsequently, Congress enacted Section 242(c) (8 U. S. C. A. 1252(c)) which would have made the requirement valid, and after that enactment the Immigration Service, without moving to modify or set aside the injunction, again gave the petitioner notice to appear and oppose the demanded bond. The Court held that the Immigration Service should obey the injunction unless and until set aside in proceedings brought for that purpose and remanded the case with directions to the Court below to issue an order to the Immigration Service to show cause why it should not be held in contempt. It did not hold that the new law was not applicable. Appellant considers the case analogous apparently on the theory that under Section 23 of the 1950 Act the Attorney General was required to make a finding regarding physical persecution as a condition to entering an order of deportability (which, as we have shown *supra,* is not a valid argument), and since this is not so, the argument fails.

Conclusion.

It is submitted that the order of the District Court affirming the decision of the Board of Immigration Appeals as to the validity of the deportation order and dismissing the defendants Carnahan and Barber as improper and unnecessary parties, should be affirmed. By stipulation and order of this Court, Richard C. Hoy, District Director of the Los Angeles office of the Immigration Service, has been substituted as defendant in the place and stead of Albert Del Guercio, resigned.

Dated: June 18, 1958.

LAUGHLIN E. WATERS,
United States Attorney,
RICHARD A. LAVINE,
Assistant U. S. Attorney,
Chief of Civil Division,
ARLINE MARTIN,
Assistant U. S. Attorney,
Attorneys for Appellee.

APPENDIX A.

Chronology.

Diamond Kimm.

July 6, 1928.	Appellant Kimm—Korean—admitted to United States as student under 8 U. S. C. 204(e) (1940 Ed.).
1935.	Appellant goes to Tijuana and returns.
1938.	Appellant abandons status as a student and is employed full time [see Ex. A in Evid.].
Dec. 13, 1941.	Warrant of Arrest issued by Immigration Service charges appellant is unlawfully in United States—failure to maintain status as a student.
March 4, 1942.	Special Inquiry Hearing—presiding inspector—appellant held deportable. Recommended voluntary departure within 60 days or at end of hostilities.
Oct. 27, 1942.	Reopened hearing *re* application for voluntary departure.
April 17, 1943.	Commissioner of Immigration and Naturalization, Washington, D. C., issues order of deportation and voluntary departure, as above.
June ...., 1946.	Administrative Procedures Act effective (prior hearings valid under subsequent decision of Supreme Court in *Sung v. McGrath*).
July 1, 1948.	Section 19(c) amended (8 U. S. C. 155(c) 1940 Ed.) to apply to Japanese and Koreans not previously racially eligible to apply for suspension.

May 19, 1949.	Notice of reopened hearing, to allow application for benefits of Section 19(c) as amended [Ex. A].
Febr. 20, 1950.	Supreme Court decision, *Sung v. McGrath*, says Administrative Procedures Act applies to Immigration and Naturalization Service.
June 6, 1950.	*Notice* of new hearing *re* deportation, as required by *Sung v. McGrath* [Ex. A].
June 16, 1950.	*Hearing*—conducted per Administrative Procedures Act. (New hearing—1942 hearings not incorporated—warrant of arrest again served on appellant at hearing.)
July 12, 1950.	Notice of further hearing on October 2, 1950 [see Ex. A in Evid.].
Sept. 27, 1950.	Act excepts Immigration and Naturalization Service from Sections 5, 7 and 8 of Administrative Procedures Act.
Oct. 2, 1950.	Further *hearing*.
Sept. 23, 1950.	Internal Security Act of 1950, in Section 23 (8 U. S. C. 156, 1940 Ed. 1951 Supp.) provides no alien shall be deported to any country in which *"the Attorney General shall find"* alien would be subject to physical persecution.
Dec. 19, 1950.	*Notice* of hearing continued on January 4, 1951 [see Ex. A in Evid.].
Jan. 15, 1951.	Hearing Officer makes proposed Order of Deportation and that order granting voluntary departure be withdrawn.

May 13, 1951.	Commission orders deportation "pursuant to law"—finds appellant ineligible for suspension of deportation and denies voluntary departure.
Jan. 22, 1952.	Board of Immigration Appeals dismisses appeal.
Dec. 24, 1952.	Section 243(h) of the Immigration and Nationality Act of 1952 provides (8 U. S. C. 1253(h)) that the Attorney General withhold deportation of alien to any country in which *"in his opinion the alien would be subject to physical persecution."*
Sept. 21, 1956.	Complaint for Review of Deportation Order filed.
April 24, 1957.	Amended Complaint filed.
April 30, 1957.	Answer to Amended Complaint filed.
July 22, 1957.	Findings of Fact, Conclusions of Law and Judgment docketed and entered.

APPENDIX B.

U. S. Department of Justice
Immigration and Naturalization Service
Los Angeles 13, California

Alien File Number A5 725 764. Jan. 15, 1951.

Decision of the Hearing Officer in re Diamond Kimm or Kim Kang or Kin Sang or Soong Iop Kim.
Charges:

Warrant: The Immigration Act of 1924, in that he has remained in the United States after failing to maintain the exempt status of a student under which he was admitted.

Lodged: None.

. . .

I. Discussion of the Evidence—Deportability.

The respondent is a native and citizen of Korea by birth in that country on October 5, 1901.

The respondent testified that he last entered the United States about July 1935 at San Ysidro, California, and at the time of that entry was admitted to resume his status in the United States as a student. He stated that at the time of that entry it was his intention to resume his student status under which he had previously been admitted into the United States.

The respondent was first admitted into the United States on July 6, 1928, at San Francisco, California, ex SS "Tenyo Maru" as a student under Section 4(e) of the Immigration Act of 1924.

The regulations in effect at the time the respondent was originally admitted into the United States provided that a student was admitted for such period as he maintained his

student status. These regulations were in effect until July 1932. General Order 94 issued on September 12, 1932, provided that an alien student might go to Mexico and certain other countries for a period not exceeding six months, then be readmitted without a new visa if he was found otherwise admissible and established to the satisfaction of the appropriate immigration officials that he had not terminated his student status.

After the respondent's admission into the United States on July 6, 1928, at San Francisco, California, he remained continuously in the United States until a date about the month of July 1935 when he made a temporary visit to Mexico, visited in that country approximately three hours, and was readmitted to the United States on the same date that he departed, being readmitted to resume the status under which he was originally admitted, that of a student.

The respondent testified that during 1938 he abandoned his status as a student and sought and accepted full-time employment.

The charge in the warrant is sustained.

II. Findings of Fact—Deportability.

Upon the basis of all the evidence presented, it is found:

(1) That the respondent is an alien, a native and citizen of Korea;

(2) That the respondent was admitted to the United States at San Francisco, California, on July 6, 1928, as a student, under Section 4(e) of the Immigration Act of 1924;

(3) That the respondent last entered the United States about July 1935 at San Ysidro, California, being readmitted to resume his student status;

(4) That the respondent abandoned his status as a student during 1938;

(5) That since the respondent abandoned his status as a student he has not departed from the United States.

III. Conclusion of Law—Deportability.

Upon the basis of the foregoing findings of fact, it is concluded:

(1) That under Sections 14 and 15 of the Immigration Act of May 26, 1924, as amended, the respondent is subject to deportation on the ground that he has remained in the United States after failing to maintain the exempt status of a student under which he was admitted.

IV. Factors Relating to Discretionary Relief.

The warrant of arrest in this case was issued on December 13, 1941, and hearings in deportation proceedings were accorded the respondent on March 14, 1942, May 16, 1942, and October 27, 1942. In those hearings the respondent applied for voluntary departure at his own expense in lieu of deportation. This privilege was recommended by the Presiding Inspector at that hearing, and on April 17, 1943, the Board of Immigration Appeals entered an order that an order of deportation be not entered at that time, but that the alien be required to depart from the United States without expense to the government to any country of his choice within 90 days following the issuance to him of an exit permit, or within 90 days following the date on which the exit permit ceased to be required in such cases.

The records of the Service contain copies of applications for exit permits in the case of this respondent, the first one dated May 27, 1945, and the second dated January 24, 1947. However, the respondent claims that he was never notified that an exit permit had been issued in his case.

On April 6, 1949, the Central Office of the Service ordered that the hearing in this case be reopened so that the alien might apply for the benefits of the Amendment to Section 19(c) of the Immigration Act of 1917, as amended on July 1, 1948, by Public Law 863.

The first reopened hearing in the case was conducted on June 16, 1950, and at that time the respondent indicated that he wished to apply for suspension of deportation and he was furnished the appropriate forms with which to do so.

The respondent is married and has one child and that wife and child reside in Korea. The wife and the child of respondent accompanied him to the United States at the time of his admission on July 6, 1928, and at that time were admitted as temporary visitors. During the year 1937 they were permitted to depart voluntarily from the United States in lieu of deportation. His wife and child have not returned to this country since then.

The respondent has resided in the United States continuously for more than seven years and was residing in the United States on July 1, 1948. However, in considering his presence in the United States during this time he was in this country as a non-resident alien student from 1928 until 1938 and the warrant for his arrest was issued on December 13, 1941.

The respondent has presented two affidavits from persons who have known him, one since 1943 and the other

since 1928, and both allege him to be a person of good moral character. He has also presented a photostatic copy of a letter showing that he during 1945 had been attached to a Strategic Services Unit of the Office of Strategic Services of the War Department. He has also presented letters written to him showing that he had been considered for a position in Korea under the War Department at a salary of more than $5,000 a year, but he testified that he did not receive that position. He also presented a letter on the stationery of the Headquarters of the Office of the Military Governor, United States Army Military Government in Korea, Seoul, Korea, dated July 16, 1946, showing that the wife of the subject had been working one of the American Army dispensaries in Korea. This letter also requested that the respondent send that headquarters a summary of his personal background, education and experience, in support of his application for work with the United States Military Government in Korea.

During the course of the hearing on October, 1950, the respondent was asked if he was a member of the Communist Party, and on the advice of Counsel he did not answer the question on the ground that it would tend to incriminate him. At a resumed hearing after a change of counsel this was pointed out to new counsel and he stood on that record. On January 15, 1951, the respondent was asked if he had even been a member of the Communist Party of the United States and he answered that he declined to answer that question on the ground of self incrimination.

The provisions of Section 19(c)(1) and (2) of the Immigration Act of 1917, as amended, provide that certain relief may be granted aliens within the discretion of the Attorney General. This relief is purely discretionary with

the Attorney General and no right to relief vests with the alien. In considering an alien for discretionary relief the Government of the United States is entitled to know his entire background and whether or not he is or has been a member of a proscribed organization, and any information which would show whether or not he is a person to whom the discretionary relief provided in Section 19(c) should be extended. By declining to answer questions as to whether he had ever been a member of a proscribed organization, on the ground of self incrimination, the respondent denies the government of knowledge to which it is entitled and the respondent places himself in a class of aliens to whom discretionary relief as provided by Section 19(c) of the Immigration Act of 1917, as amended, is not available.

In view of the foregoing it must also be deemed that in view of his failure to answer the questions propounded, the respondent has not affirmatively proved that he has been a person of good moral character for the past five years.

The respondent has no relatives in the United States and no one in this country is dependent upon him for support and maintenance. He owns no property except a one-third interest in some printing machinery which he values at about $750.00 and some books which he values at about $50.00. He had no finances except that he claims to have now furnished the money to the person who placed a $500.00 bond for the release of the respondent in deportation proceedings.

The respondent has stated that in the event he is found subject to deportation and ordered deported he specifies Korea as the country to which he shall be deported.

V. Discretionary Relief—Findings of Fact.

Upon the basis of all the evidence presented, it is found:

(1) That the respondent is a person of the Korean race;

(2) That the respondent has failed to prove that he has been a person of good moral character for the past 5 years;

(3) That the respondent has declined to answer questions as to whether he has been a member of a proscribed organization, on the ground of self incrimination;

(4) That the respondent has resided in the United States continuously for 7 years or more and was residing in the United States on July 1, 1948;

(5) That the respondent declines to answer questions on the ground of self incrimination which might establish that the respondent is deportable on grounds specified in Section 19(d) of the Immigration Act of 1917, as amended.

VI. Discretionary Relief—Conclusions of Law.

Upon the basis of the foregoing findings of fact, it is concluded:

(1) That under Section 19(c)(1) of the Immigration Act of 1917, as amended, the respondent has failed to establish statutory eligibility for voluntary departure in lieu of deportation;

(2) That under Section 19(c)(2) of the Immigration Act of 1917, as amended, the respondent has failed to establish eligibility for suspension of deportation.

VII. Recommended Order.

It is recommended that the alien be deported from the United States pursuant to law on the charge stated in the warrant of arrest.

It is further recommended that the order of the Board of Immigration Appeals dated April 17, 1943, granting voluntary departure in lieu of deportation to this alien, be withdrawn.

/s/ John B. Bartos
John B. Bartos,
Hearing Officer.

APPENDIX C.

List of Exhibits.

With Page References in Transcript of Record.

Kimm v. Barbour, et al.

Govt's Exhibits	Description	Identified	In Evidence	Pages
A	Certified copy of Administrative File	X	X	3-4, 43, 44
B	Photostat of Portion of pamphlet "Immig. Laws & Rules of Mar. 1, 1927, U. S. Dept. Labor" including pp. 11, 125, 126.	X	Excluded	18, 19
C	Photostat of Gen. Order 207, dated Dec. 21, 1923, defining "status."	X	Excluded	19-21
D	Certified copy of 1941-42 Immigration hearings.	X	X	21-24
Pltf's Exhibits				
1	Immigration form letter X to Plaintiff dated Feb. 8, 1952.	X	Excluded	4-18